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January 30, 2001

BY HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-B204
Washington, D.C. 20554

Re: *In the Matter of Petition for Declaratory Ruling, City Signal Communications, Inc. v. City of Wickliffe, OH,*
CS Dkt. No. 00-254

Dear Ms. Salas:

Enclosed please find an original and six (6) copies of the Comments of the City of Richmond, Virginia filed with respect to the above referenced proceeding.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Robert M. Cooper

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of Petition for Declaratory Ruling City Signal Communications, Inc., Petitioner, v. City of Wickliffe, OH, Defendant.	CS Docket No. 00-254

COMMENTS OF THE CITY OF RICHMOND, VIRGINIA

The City of Richmond, Virginia ("Richmond") hereby submits these comments in response to the petition filed by City Signal Communications, Inc. ("City Signal") in the above-referenced proceeding.[1] These comments address the relationship between Section 253 of the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 253, and the ability of a local or municipal government to require telecommunications providers to install fiber optic cable or other lines used for the provision of telecommunications services in underground conduits.[2]

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1 *See* "Comments Sought on City Signal Communications, Inc. Petition for Declaratory Ruling Concerning Use of Public Rights of Way for Access to Poles in Wickliffe, Ohio Pursuant to Section 253," Public Notice, DA 00-2871, CS Dkt. No. 00-254 (December 22, 2000).

2 Richmond takes no position on either the specific allegations in the petition relating to City Signal's course of dealing with Wickliffe, or on the scope of municipal authority to regulate telecommunications, utility or cable operators under Ohio law.

City Signal is seeking a ruling from the Federal Communications Commission (the "Commission") that under Section 253 of the Act (i) local governments do not have the authority to mandate that fiber optic cable or other telecommunications lines be installed underground, and (ii) if other telecommunications carriers already have fiber optic cable or other lines installed on aerial poles, then all subsequent applicants must be able to install their facilities on aerial poles as well. This request reflects a fundamental misunderstanding of the Act. First, the power to direct whether fiber optic cable (or other telecommunications wires) should be placed above or underground is well within the scope of authority reserved to local governments by Section 253 of the Act. Second, it is well established that, in managing its public rights-of-way, a local government need not treat every putative telecommunications provider identically. Accordingly, the Commission should reject City Signal's petition.

I. Section 253 of the Act Does Not Interfere With Local Governments' Authority to Direct Whether Cables and Wires, Including Telecommunications Lines, Should Be Installed Above or Underground

Section 253 of the Act provides, in relevant part, as follows:

> (a) IN GENERAL.— No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) STATE REGULATORY AUTHORITY.— Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

> (c) STATE AND LOCAL GOVERNMENT AUTHORITY.— Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.[3]

"The structure and language of § 253 embodies the balance between Congress' 'new free market vision' and its recognition of the 'continuing need for state and local governments to regulate telecommunications providers on grounds such as consumer protection and public safety.'" TCG New York, Inc. v. City of White Plains, ___ F. Supp.2d ___, 2000 WL 1873845, *4 (S.D.N.Y. Dec. 20, 2000) (*quoting* Cablevision of Boston, Inc. v. Public Improvement Commission of the City of Boston, 184 F.3d 88, 98 (1st Cir. 1999)) ("White Plains"). Thus, while Section 253 clearly was conceived as an element of the Act's overall market opening initiative, equally important was its recognition of local governments' traditional role in managing local public rights-of-way. *See id.*, 2000 WL 1873845, *7 (Section 253(c) "preserves the authority of local governments to manage the public rights-of-way."). Indeed, the Commission itself has recognized the Act's preservation of local government authority, and specifically has noted that this authority relates to the requirement to place facilities underground.

In In re Classic Telephone, Inc., Memorandum Opinion and Order, 11 FCC Rcd. 13,082 (1996), the Commission cited statements made by Senator Diane Feinstein during the Senate floor debate on Section 253(c) as illustrative of the types of restrictions that local governments could impose as part of their public rights-of-way management.

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[3] 47 U.S.C. § 253.

Included among those was the ability to "'require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies.'" *Id.* at ¶ 39 (*quoting* 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from the Office of City Attorney, City and County of San Francisco)). More generally, the Commission has stated:

> Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way.[4]

Thus, there can be no doubt that Congress did not intend to remove the authority of local governments to decide, based on the particular circumstances present in a local jurisdiction, whether telecommunications facilities should be located underground. This is not surprising, because it is difficult to conceive of a matter that has a greater impact on a local government's prerogatives to maintain and manage its public rights-of-way.

"Undergrounding" utilities (moving above-ground utilities system components from above-ground to below ground locations), and requiring new components to be placed underground from the beginning, has been a common objective of local governments for many years. In seeking to locate utilities in below ground locations municipal governments consider issues relating to aesthetics and, more importantly, the health and welfare of citizens. While above-ground utilities tend to produce visual blight and lower property values, they also expose vital electrical and communications

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[4] In re TCI Cablevision of Oakland County, Inc. Memorandum Opinion and Order, 12 FCC Rcd. 21,396, ¶ 103 (1997) (emphasis added).

infrastructure to severe damage from ice storms, wind storms, snow storms, tornadoes, hurricanes and other acts of nature. As recently as late December 2000 and early January 2001, extensive ice storms in Arkansas, Louisiana, Missouri, Oklahoma, and Texas caused power and communications outages which directly threatened the health, safety and welfare of several hundreds of thousands of people. This disruption of vital services can be ameliorated, if not eliminated, by the placement of such facilities underground.

Congress recognized in enacting the Act that an appropriate balance can and should exist between encouraging a vital market for new and competitive telecommunications services and reserving to local governments their historical authority to manage public rights of way. Moreover, both the Commission and numerous courts have confirmed that the Act does not, and was not intended to, render local governments impotent with respect to maintaining control over the use of public property. As long as the exercise of such control does not actually or effectively prohibit the provision of telecommunications services – which, of course, requiring the placement of facilities underground does not – local governments remain free to manage their rights-of-way as they see fit, provided that they do so in a competitively neutral manner.

II. Competitive Neutrality Does Not Require That All Prospective Telecommunications Providers Be Able to Place Facilities Above-Ground Simply Because Other Providers Who Previously Installed Facilities Maintain Certain Above-Ground Telecommunications Facilities

City Signal argues in its petition that because other telecommunications providers have fiber optic cable – and, presumably, other facilities – on above-ground utility poles, that they must be afforded identical treatment. This proposition makes no sense and is at odds with the Act.

While it is true that Section 253(c) requires local governments to manage their public rights-of-way "on a competitively neutral and nondiscriminatory basis,"[5] nothing in the Act requires that all providers be treated identically. The legislative history of the Act demonstrates that Congress rejected a so-called "parity" requirement that would have mandated that all providers be treated the same. The provision that ultimately was codified as Section 253(c) was added by an amendment known as the Stupak-Barton amendment. Opponents of that amendment – who supported the "parity" concept – recognized that Section 253(c) would permit differential treatment. For example, Representative Schaefer spoke "in strong opposition to this Stupak amendment because it . . . strikes a critical section of the legislation that was offered to prevent local governments from continuing their longstanding practice of discriminating against new competitors in favor of telephone monopolies."[6] Similarly, Representative Fields complained that the prior version of Section 253 was "necessary to overcome historically based discrimination against new providers," and that Stupak-Barton would allow local governments to charge new providers a "percentage of revenue fee" even though "[i]n many cities, the incumbent telephone company pays nothing, only because they hold a century-old charter, one which may even predate the incorporation of the city itself."[7] A sponsor of the amendment, Representative Stupak, confirmed his opponents' understanding of Section 253(c).

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5 47 U.S.C. § 253(c).

6 141 Cong. Rec. H8460-61 (daily ed. August 4, 1995) (statement of Rep. Schaefer).

7 *Id.* at H8461 (statement of Rep. Fields).

> The [old version of Section 253] states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets. Because the contracts have been in place for many years, some as long as 100 years, if our amendment is not adopted, if the Stupak-Barton amendment is not adopted, you will have companies in many areas securing free access to public property.[8]

Although much of the debate was focused on the imposition of franchise fees, it is clear that the elimination of the "parity" requirement is much broader in scope. A number of courts have concluded that a local government "need not treat [an incumbent carrier] and [a carrier seeking to install new facilities] identically in order to satisfy § 253(c)." White Plains, 2000 WL 1873845, *16. *See also* Cablevision of Boston, Inc. v. Public Improvement Commission of the City of Boston, 184 F.3d 88, 103 (1st Cir. 1999) ("As long as the City makes distinctions based on valid considerations, it cannot be said to have discriminated against [the carrier seeking to install new facilities] in favor of [an incumbent carrier]."); TCG Detroit v. City of Dearborn, 16 F. Supp.2d 785, 792 (E.D. Mich. 1998), *aff'd*, 206 F.3d 618 (6th Cir. 2000) ("the explicit language of the statute does not require such strict equality"; noting that Congress rejected exact parity); AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F. Supp.2d 582, 593 (N.D. Tex. 1998) ("being competitively neutral does not require cities to treat all providers identically and to ignore the significant differences among them.").

The critical import of Section 253(c) is that *similarly situated carriers must be treated similarly*. With respect to "undergrounding" requirements, not all carriers are similarly situated. One of the principal distinctions is time. It is perfectly reasonable – as

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[8] *Id.* at H8460 (statement of Rep. Stupak).

well as nondiscriminatory and competitively neutral – for a local jurisdiction to determine as matter of public policy that, at some point, the number of above-ground facilities simply has or may become too great. Whether this determination is made for public safety reasons, for concern as to the physical capacity of utility poles or even for aesthetic reasons, it is well within a local government's authority to decide that all future telecommunications (or, for that matter, all utilities) facilities must be located underground.[9] While such a determination may very well result in pre-existing providers, including, in many cases, incumbent local exchange carriers or cable companies, being able to maintain above-ground facilities while new providers must install facilities underground, that is simply a fortuitous result of chronology, and in no way reflective of any discriminatory treatment or intent. As long as all similarly situated providers are treated similarly (*i.e.*, those who apply within proximity to one another are subject to the same rules) there is no issue under Section 253.

CONCLUSION

For all of the foregoing reasons, the City of Richmond, Virginia respectfully requests that the Commission deny the relief requested in City Signal Communications, Inc.'s petition for declaratory ruling, to the extent that such petition seeks a ruling that local governments are prohibited under Section 253 of the Act from requiring that telecommunications providers install facilities underground when using public rights-of-ways.

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[9] Of course, in certain cases, local government authority may be limited by state law, but that is not relevant to the Commission's consideration of the pending petition.

Dated: January 30, 2001

CITY OF RICHMOND, VIRGINIA

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and

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Comments of the City of Richmond, Virginia was served upon the following individuals in the manner indicated on this 30th day of January, 2001.

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